FILED
MAY 10 1979
MICHAEL RODAK, JR., CLE

No. 78-1414

In the Supreme Court of the United States

OCTOBER TERM, 1978

GERALDINE ROBESON, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINION BELOW

The order of the court of appeals (Pet. App. 1) is not reported.

JURISDICTION

The order of the court of appeals was entered on October 2, 1978. A timely petition for rehearing was denied on December 18, 1978 (Pet. App. 2). The petition for a writ of certiorari was filed on March 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court of appeals has jurisdiction to review the refusal of the General Counsel of the National

Labor Relations Board to issue a backpay specification and notice of hearing.

STATUTORY PROVISION INVOLVED

Section 10(f) of the National Labor Relations Act, 29 U.S.C. 160(f), provides in pertinent part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside.

STATEMENT

In an unfair labor practice proceeding under Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), the Board determined that the Retail Clerks Union, Local 588, Retail Clerks International Association, AFL-CIO (hereafter "the Union"), had unlawfully discharged petitioner on June 18, 1975, from her position as an employee of the Union. The Board ordered petitioner's reinstatement with backpay. 227 N.L.R.B. 7 (1976).

Petitioner was reinstated by the Union on January 3, 1977. The Board's Regional Office computed the amount of backpay which was owed by the Union to petitioner in accord with applicable legal principles concerning the backpay claimant's responsibility to

make diligent efforts to find interim employment.[1] Thus, it determined that, because petitioner had merely registered for unemployment and sought referrals through the Union and had made no independent effort to seek interim employment between June 18, 1975, and April 28, 1976, she was not entitled to backpay for that 10-½ month period. The Regional Office concluded that the amount of backpay owed petitioner for the period from May 1976 through January 3, 1977, was approximately $8,000. The Union paid petitioner this sum and also posted the notice prescribed by the Board's order for the requisite period of time. On May 31, 1977, the Regional Director determined that the Union was in full compliance with the Board's order, and notified petitioner that the case was closed.

On May 28, 1977, petitioner requested the Regional Director to review the backpay computations and the decision to close the case (Supp. Pet. App. B). On July 18, 1977, the Regional Director denied the request, explaining that the General Counsel would "be unable to prevail on the claimant's behalf in the course of backpay litigation" if a larger amount of backpay

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[1] A discriminatee is not entitled to backpay for periods in which he fails to search diligently for alternative work following an unlawful discharge. See *NLRB* v. *Mastro Plastics Corp.*, 354 F. 2d 170, 174 n.3 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966); *NLRB* v. *Miami Coca-Cola Bottling Co.*, 360 F. 2d 569, 575 (5th Cir. 1966). See also *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 198, 199-200 (1941) (since only actual losses may be compensated for, a discriminatee's gross backpay should be reduced "for losses which he willfully incurred" and for "clearly unjustifiable refusal to take desirable new employment").

was demanded from the Union (Supp. Pet. App. C).[2] On August 6, 1977, petitioner appealed this decision to the General Counsel (Supp. Pet. App. D). After investigation of the matter, the General Counsel's Office denied petitioner's appeal for reasons similar to those stated in the Regional Director's letter (Supp. Pet. Apps. E, F). On January 11, 1978, the Regional Director denied petitioner's request to issue a backpay specification, in order to initiate formal backpay proceedings (Supp. Pet. App. H).[3]

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[2]The Regional Director stated (Supp. Pet. App. C):

> As the Region's Compliance Officer explained to you, we must be able to prove that a backpay claimant remained in the labor market and exercised requisite diligence in seeking interim employment at all times during his or her backpay period. The standards imposed by the Board, as approved by courts require more than mere registration at state unemployment offices and/or union registration facilities. A backpay claimant also must make independent efforts to find employment after being discharged. Failing this it cannot be said the claimant was sufficiently diligent with respect to his or her efforts to secure employment. In these circumstances we should be unable to prevail on the claimant's behalf in the course of backpay litigation due to well settled law that backpay cannot be computed for times when employment is not more actively sought than merely by placing one's name on registration lists.

[3]The Board's Rules and Regulations provide in part (29 C.F.R. 102.52):

> After the entry of a Board order directing the payment of back pay or the entry of a court decree enforcing such a Board order, if it appears to the regional director that a controversy exists between the Board and a respondent concerning the amount of back pay due which cannot be resolved without a formal proceeding, the regional director may issue and serve upon all parties a back-pay specification in the name of the Board. The specification shall contain or

Thereafter, petitioner filed a petition for review of the Regional Director's refusal to issue a backpay specification in the court of appeals. The court granted the Board's motion to dismiss for lack of jurisdiction. (Pet. App. 1).

ARGUMENT

The decision of the court of appeals is correct and in accord with established principles, and there is no conflict of decisions. Review by this Court is unwarranted.

1. Section 10(f) of the National Labor Relations Act provides that "[a]ny person aggrieved by a final order of the Board" may petition for review in an appropriate court of appeals. As this Court has held, a "final order" is one entered by the Board at the culmination of a formal proceeding conducted under Section 10(c) of the Act. *American Federation of Labor* v. *NLRB*, 308 U.S. 401, 409 (1940).

The determination by the Regional Director, acting as a representative of the General Counsel,[4] that the Union had fully complied with the Board's order and that issuance of a backpay specification and notice of hearing was not warranted, is not a "final order" within the meaning of the Act. Rather this decision reflects an administrative determination that, in light of

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> be accompanied by a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 15 days after the service of the specification.

[4]Section 3(d) of the Act, 29 U.S.C. 153(d), vests the General Counsel with "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10." As shown *infra*, the issuance of a backpay specification is analogous to the issuance of a complaint because it triggers a supplemental proceeding under Section 10.

the applicable legal principles, the General Counsel could not prevail, if a formal backpay proceeding were instituted, on petitioner's contention that she was entitled to backpay for the entire period between her discharge and her reinstatement, because for part of the period she had not made a reasonably diligent effort to secure interim employment.[5] Thus, this decision—made on the basis of an evaluation of the potential strengths and weaknesses of the General Counsel's case—is analogous to the General Counsel's decision not to issue an unfair labor practice complaint. The courts of appeals have consistently held that the General Counsel's determination not to issue an unfair labor practice complaint is not a final order of the Board and hence is not reviewable in the courts of appeals under Section 10(f). See *Lincourt* v. *NLRB*, 170 F. 2d 306 (1st Cir. 1948); *General Drivers, Chauffeurs, and Helpers, Local 886, AFL-CIO* v. *NLRB*, 179 F. 2d 492 (10th Cir. 1950); *Manhattan Construction Co.* v. *NLRB*, 198 F. 2d 320 (10th Cir. 1952); *Newspaper Guild, Erie Newspaper Guild, Local 187* v. *NLRB*, 489 F. 2d 416, 426 (3d Cir. 1973). These holdings are in accord with this Court's recognition that the General Counsel's discretion to

[5]Petitioner has not disputed the Regional Director's determination that for more than 10 months during the backpay period petitioner made no independent effort to obtain interim employment. Petitioner did contend (Supp. Pet. App. D), however, that her failure to search for employment should not serve as a basis for denying her backpay because the Region never notified her of her obligation to look for interim employment. The General Counsel properly determined (Supp. Pet. App. F) that the failure of the Regional Office to notify a discriminatee of the obligation under the law to make a reasonable search for interim employment does not relieve the discriminatee of that obligation. See *Phelps Dodge Corp.* v. *NLRB, supra*, 313 U.S. at 199-200.

issue unfair labor practice complaints is unreviewable. See *Detroit Edison Co.* v. *NLRB*, No. 77-968 (Mar. 5, 1979), slip op. 14; *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967).

As the Court stated in *NLRB* v. *Sears, Roebuck & Co., supra*, 421 U.S. at 138-139:

> Congress has delegated to the Office of General Counsel, "on behalf of the Board" the unreviewable authority to determine whether a complaint shall be filed. 29 U.S.C. §153(d); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967). In those cases in which he decides that a complaint shall issue, the General Counsel becomes an advocate before the Board in support of the complaint. In those cases in which he decides not to issue a complaint, no proceeding before the Board occurs at all. The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration.

Similarly, in backpay proceedings, the General Counsel functions as an advocate before the Board on behalf of the backpay claimant and thus, before initiating proceedings, must have reasonable cause to believe that the claim for backpay is meritorious.[6] Section 10(f)

[6]After a backpay specification is issued by the Regional Director, a hearing is held before an administrative law judge, whose decision is subject to review by the Board. A Board decision and order in a backpay proceeding, as distinguished from

does not make this prosecutorial determination by the General Counsel reviewable.[7]

2. The decisions in both *Leeds & Northrup Co.* v. *NLRB*, 357 F. 2d 527 (3d Cir. 1966) and *International Ladies' Garment Workers Union, Local 415-475, AFL-CIO* v. *NLRB*, 501 F. 2d 823 (D.C. Cir. 1974), relied upon by petitioner (Pet. 14), are distinguishable. In both of those cases, the courts found jurisdiction under Section 10(f) to consider certain objections raised by the charging party to an informal settlement agreement entered into by the General Counsel and the charged party subsequent to the issuance of an unfair labor practice complaint. Both courts recognized that the General Counsel's decision not to issue a complaint is unreviewable. See *Leeds & Northrup Co. supra*, 357 F. 2d at 534; *International Ladies' Garment Workers Union, Local 415-475* v. *NLRB, supra*, 501 F. 2d at 830-831. The determinative factor in both cases was the fact that the General Counsel had issued unfair labor practice complaints prior to entering into the

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the General Counsel's decision to institute such a proceeding, is reviewable under Section 10(f) of the Act. See, e.g., *NLRB* v. *Mastro Plastics Corp.*, 354 F. 2d 170, 174 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966).

[7]Contrary to petitioner's claim (Pet. 7), it is not "likely" that the Ninth Circuit dismissed the petition for review on the basis that petitioner was not a "person aggrieved" within the meaning of Section 10(f) of the Act. The Board did not urge that position in the court of appeals, but rather contended that the Regional Director's determination not to issue a backpay specification was not a final order within the meaning of Section 10(f). In any event, the court lacked jurisdiction because of the lack of a final order. This was true, too, in *Anthony* v. *NLRB*, 132 F. 2d 620 (9th Cir. 1942), where the "order" sought to be reviewed was the Board's refusal to issue a complaint. (Under the Wagner Act, the complaint power was lodged in the Board.)

settlement agreements. In the present case, unlike *Leeds & Northrup* and *ILGWU*, petitioner seeks review not of a post-complaint settlement, but of the determination that there was an insufficient legal and factual basis to issue a backpay specification and thereby initiate proceedings to obtain backpay for the entire backpay period.[8]

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[8]Contrary to petitioner's contention (Pet. 14), the fact that the General Counsel originally issued a complaint charging the Union with violating Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), does not bring this case within the terms of *Leeds & Northrup* or *ILGWU*. While the underlying discriminatory discharge case established the Union's commission of an unfair labor practice and its backpay obligation, the proceeding to determine the extent of the backpay liability is essentially a separate proceeding to resolve distinct issues, and therefore requires that the General Counsel evaluate a wholly new set of factual and legal issues in determining whether to proceed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DOJ-1979-05